Commission erred by adopting class-specific wholesale discount rates without a detailed exploration of the appropriateness of the allocation process used to develop the class-specific resale discounts.

SPRINT: Sprint also objected to the Commission's decision concerning the wholesale discount rate. Sprint viewed the Commission's wholesale discount rate as an interim rate. Sprint recommended that the Commission establish permanent wholesale discount rates on the basis of each company's actual avoided costs.

DISCUSSION

Concerning class-specific wholesale rates, the Commission's view was that if the information is available, separate wholesale rates should be calculated for business and residential services. Since BellSouth's avoided cost study provided a basis for determining separate residential and business wholesale discount rates, the Commission believed that it was appropriate to use the information to calculate separate wholesale discount rates. Although neither the FCC Interconnection Order nor the Act mandates using separate wholesale discount rates, other State Commissions across the country including California, New Hampshire, Georgia, Kentucky, and Florida have ordered separate wholesale discount rates for residential and business services.

The Commission continues to believe that it is appropriate to establish separate wholesale discount rates for both residential and business services since adequate information is available to make the calculation of separate wholesale discount rates.

Addressing Sprint's comments, the Commission in no way viewed the ordered wholesale discount rates as interim. The Commission did follow the basic methodology of the FCC Interconnection Order. However, the Commission did not order interim wholesale discount rates. The Commission prepared its own avoided cost analysis based on the entire record and established permanent wholesale discount rates which meet the requirements of the Act.

The Commission's position is that the RAO did not establish interim wholesale discount rates and that the wholesale discount rates do not have to be calculated based on BellSouth's estimation of its avoided costs.

CONCLUSIONS

Based on the foregoing and the entire evidence of record, the Commission concludes that its original decision on this issue should be affirmed.

ISSUE NO. 11: What is the appropriate price for each unbundled network element?

INITIAL COMMISSION DECISION

Regarding recurring charges, the Commission established interim rates, subject to true-up, for unbundled network elements based on consideration of MCI's and BellSouth's cost studies and the FCC's proxy rate guidelines or "default proxies", i.e., proxy rate ceilings, proxy rate ranges, and other proxy rate provisions, that state regulatory agencies could utilize on an interim basis in lieu of using a forward-looking, economic cost study complying with the FCC's total element long-run incremental cost-based (TELRIC-based) pricing methodology.

The rate established for the network interface device (NID) as an unbundled network element was the rate proposed by MCI based on its cost study. MCI's rate was the only NID rate in evidence. The FCC Interconnection Order did not provide a proxy for the NID.

The parties were directed to make a good faith effort to negotiate rates for operator systems services if the negotiated interconnection agreement did not include pricing for a particular operator or directory assistance service desired by MCI. Other recurring charges established for unbundled network elements were based on the FCC's default proxies.

The Commission did not establish nonrecurring charges for unbundled network elements in its RAO.

COMMENTS/OBJECTIONS

MCI: MCI objected to the manner in which the Commission established rates for unbundled network elements. MCI alleged that Finding of Fact No. 23 failed to meet the requirements of Section 251 of TA96, including regulations prescribed by the FCC, and that such finding failed to meet the standards set forth in subsection (d) of Section 252 of TA96. Specifically, MCI alleged that this Finding of Fact established interim rates for unbundled network elements which are not based on the cost of providing the interconnection or network element.

MCI also objected to the true-up requirement of Finding of Fact No. 23. MCI alleged that this requirement created uncertainty because the interim rates are subject to change and as such will chill the entry of competing local exchange carriers into the market. MCI thus asserted that the true-up provision is inconsistent with the purpose of TA96.

BELLSOUTH: After noting that the Commission did not establish nonrecurring charges for unbundled network elements in the RAO, BellSouth asserted that the only

nonrecurring charges in the record for unbundled network elements were those proffered by BellSouth. BellSouth pointed out that the Hatfield Model, which was employed by MCI to derive MCI's recommended prices for unbundled network elements, does not produce discrete nonrecurring charges. Rather, its nonrecurring costs, according to proponents of the Hatfield Model, are covered by the recurring rates that it produces.

CUCA: CUCA commented that the true-up mechanism[1] ". . . is a potentially troublesome development which may impair the near-term development of effectively competitive local exchange markets." CUCA asserted that the true-up mechanism will cause new entrants to hesitate to enter North Carolina local exchange markets utilizing a strategy based upon the purchase of unbundled network elements for fear that the cost of such a strategy cannot be currently ascertained. CUCA further contended that the use of a true-up is probably unlawful. Additionally, CUCA commented that the Commission can avoid the danger of carriers being harmed in the absence of a true-up provision by simply conducting the proceeding necessary to permit the adoption of appropriate prices for unbundled network elements and similar items expeditiously. In concluding its comments in this regard, CUCA stated that "[t]he potential benefits to certain affected parties from the availability of the 'true-up' mechanism simply do not outweigh the adverse impact of this device on the competitive process." Thereafter, CUCA asserted that the Commission should remove the true-up provision contained in the RAO from any final Order entered in this proceeding.

CAROLINA AND CENTRAL: These companies encouraged the Commission to expeditiously convene a generic cost proceeding to investigate the various costing methodologies to be proposed by interested parties and to determine the appropriate cost methodology to be used in developing permanent rates for unbundled network elements. Although the unbundled network element pricing sections of the FCC rules set forth in its First Report and Order in CC Docket No. 96-98 have been stayed by the Eighth Federal Circuit Court of Appeals, the Act requires the permanent price of unbundled network elements to be based on the cost of providing the element. These companies believe the RAO to be in compliance with the Act (and the FCC regulations) so long as the Commission moves quickly to determine the appropriate permanent rates and requires a true-up of the interim proxy rates at such time as the permanent rates are adopted.

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[1] CUCA noted in its comments that the Commission also approved a similar true-up mechanism with respect to the interim prices established for a number of other services, including transport and termination services.

DISCUSSION

MCI's assertion that the rates established for unbundled network elements were not based on cost appears to be without merit. As previously indicated, such rates were based on consideration of MCI's cost study, BellSouth's cost studies, or the FCC's default proxies. As clearly evidenced by its Interconnection Order, the FCC's default proxies were based on cost. Therefore, it is not unreasonable to conclude that this Commission's proxy-based interim rates were in fact cost-based, since they were based on cost studies submitted by MCI or BellSouth and the FCC's proxies which were themselves based on cost.

MCI and CUCA's argument that the negative consequences of the true-up mechanism outweigh potential benefits is not persuasive. There might be some validity to the argument that the Commission's decision in this regard might potentially have an adverse effect on the advent of competition. However, the likelihood of occurrence of such a potentiality and the potential significance thereof do not appear to outweigh the obvious and very real benefits gained from the true-up provision, i.e., protecting carriers from irreparable harm.

In support of its position that the true-up mechanism is "probably unlawful", CUCA in its comments stated that "[n]othing in either 47 U.S.C. §252(d) or the now-stayed FCC rules providing for the use of proxy unbundled network element prices in any way suggests the appropriateness of such a 'true-up'." Further, CUCA stated that "[t]he absence of any statutory or regulatory provision for such a 'true-up' suggests that the Commission has no power to impose one." Contrary to CUCA's view, it would appear that the Commission clearly has such statutory authority, since the FCC in its Interconnection Order in addressing interim transport and termination rate levels stated that "[s]tates must adopt 'true-up' mechanisms to ensure that no carrier is disadvantaged by an interim rate that differs from the final rate established pursuant to arbitration."[2]

CUCA's position that the Commission can avoid the danger of carriers being harmed in the absence of a true-up provision by simply conducting the proceeding necessary to permit the adoption of appropriate prices for unbundled network elements and similar items expeditiously is unreasonable and unrealistic in that it appears to ignore the immense scope and complexity of the issues to be resolved, the fact that the pricing provisions of the FCC Interconnection Order are now on appeal, and this Commission's resource limitations. Simply put, in the absence of a true-up, it does not now appear that the matters at issue in these proceedings involving rates for unbundled network elements can be finally resolved within a time frame that would prevent carriers from experiencing irreparable harm should the Commission later determine that the interim rates established by the RAO were materially inappropriate.

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[2] See Paragraph 1066 of the FCC Interconnection Order.

The arbitrating parties submitted additional information regarding matters related to the prices issue in conjunction with the filing of the Composite Agreement. Therefore, certain matters (such as nonrecurring charges, true-up provisions, etc.) will be addressed further subsequently in that part of this Order dealing with unresolved issues related to the Composite Agreement.

CONCLUSIONS

Based upon the foregoing and the entire evidence of record, the Commission concludes that its original decision with respect to recurring charges for unbundled network elements and services, including true-up provisions, should be affirmed.

ISSUE NO. 12: What is the appropriate price for certain support elements relating to interconnection and network elements?

INITIAL COMMISSION DECISION

The Commission established interim rates, subject to true-up, for support elements based on BellSouth's tariffed rates, where such rates exist, pending resolution of the appeal of the FCC Interconnection Order and the establishment of final rates by this Commission. Where such rates could not be so established, the Commission required the arbitrating parties to renegotiate these issues.

COMMENTS/OBJECTIONS

MCI: MCI objected to this Finding of Fact for the same reasons that it objected to Finding of Fact No. 23, i.e., the Company contended that these rates were unlawfully established since, according to MCI, they were not based on cost and that the true-up provision is inconsistent with the purpose of TA96 because it will chill market entry by competing local service providers due to pricing uncertainty.

CUCA: CUCA's concern and comments in this regard are the same as those presented earlier under Issue No. 11 and need not be repeated here.

DISCUSSION

MCI takes the position that unbundled network elements and related support elements should be priced at total service long-run incremental cost (TSLRIC) and TELRIC. BellSouth's position is that the pricing of support elements should be consistent with the pricing which it recommended that the Commission employ for unbundled network elements.

For reasons discussed earlier under Issue No. 11, arguments offered by MCI and CUCA in support of their positions in this regard are unpersuasive.

CONCLUSIONS

The Commission affirms its original decision on this issue.

ISSUE NO. 13: What actions should the Commission take to supervise the implementation of its decisions?

INITIAL COMMISSION DECISION

The Commission concluded that it has already made provisions for the supervision of the implementation of its decisions. The Commission concluded that it would follow its previously approved arbitration procedures adopted by Commission Orders issued August 19, 1996, in Docket Nos. P-100, Sub 133, and P-140, Sub 50, and October 31, 1996, in Docket No. P-141, Sub 29.

COMMENTS/OBJECTIONS

MCI: MCI objected to the Commission's failure to provide a procedure for the parties if they fail to reach a comprehensive Composite Agreement. MCI requested that the Commission adopt the following:

> "If the parties are unable to reach a comprehensive agreement in the specified time frame, each party should submit its own version of a proposed agreement, and the Commission will choose and approve the agreement that best comports with its decision."
>
> "In the event that a comprehensive Composite Agreement is not reached by the deadline, the Commission does not bind itself to accept, in its entirety, the proposed agreement submitted by either party. The Commission will retain the flexibility (a) to accept the entire proposed agreement submitted by either party, or (b) to accept, on an issue-by-issue basis, parts of the proposed agreements offered by each party."

DISCUSSION

The Commission's view was that previous Commission Orders had been issued setting forth a reasonable implementation process. In its Order issued on October 31, 1996, in Docket No. P-141, Sub 29, relating to MCI's petition for clarification, the Commission concluded and found the following:

"If the parties still have outstanding differences at the time the composite agreement is submitted, they should submit the composite agreement as to the agreed terms and a joint list of unresolved issues stating each party's position, with appropriate citation, along with recommendations as to how the Commission should proceed, whether through further arbitration, mediation, continued negotiations, or otherwise."

The Commission believed that this language provided the parties with sufficient guidance as to how any unresolved issues should be handled.

On February 7, 1997, MCI and BellSouth submitted their Composite Agreement as to the agreed terms, in accordance with the RAO, and a "Joint List of Unresolved Issues" stating each party's position, along with recommendations as to how the Commission should proceed. The Commission considers that such filing indicates that the Commission has already provided a procedure for the parties if they fail to reach a comprehensive Composite Agreement.

CONCLUSIONS

Based upon the foregoing and the entire record of evidence, the Commission concludes that its original decision on this issue should be affirmed.

UNRESOLVED ISSUES

ISSUE NO. 1: NOTICE OF CHANGES TO BELLSOUTH'S NETWORK
Contract Location: Part A, General Terms and Conditions, Section 1.2
Page 1 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

BellSouth proposes to provide prior written notice to MCI of its intent to discontinue any service provided or required under the agreement and not to discontinue any service without MCI's prior written consent. MCI objects to the omission of language prohibiting BellSouth from reconfiguring, reengineering, or redeploying its network "in a manner which would impair MCI's ability to offer Telecommunications Services," and the omission of language stating that all obligations are material and that time is of the essence. The language proposed by BellSouth satisfies the requirements in Finding of Fact No. 10, and the Evidence and Conclusions for Finding of Fact No. 10, of the Commission's RAO of December 23, 1996, in Docket No. P-141, Sub 29, and is the same language that has been accepted by AT&T Communications of the Southern States, Inc. (AT&T) in Docket No. P-140, Sub 50. There is no evidentiary support for the argument that the additional language introduced by MCI is necessary.

CONCLUSIONS

The Commission concludes that the language proposed by BellSouth satisfies the requirements of its Order and should be approved.

ISSUE NO. 2: INDEMNIFICATION AND LIMITATION OF LIABILITY
Contract Location: Part A, General Terms and Conditions, Sections 11 and 12
Page 4 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

BellSouth proposes to use language largely taken from the May 15, 1996, partial interim agreement between BellSouth and MCI. MCI's proposed language contains fewer express limitations of liability. MCI suggests that it is willing to accept BellSouth's language if the limitation of liability does not apply to amounts payable under Attachment X, which applies to partial recovery of direct damages or either party's indemnification obligations.

The Commission declined to prescribe general terms and conditions, specifically including liability and indemnity, in Finding of Fact No. 31 and the Evidence and Conclusions for Finding of Fact No. 31 of the RAO, leaving the parties free to negotiate contractual provisions that are not required by the Act or by the FCC's Rules. While a

provision of this nature is not inappropriate, the terms of the provision are not issues of fact or law suitable for arbitration. Furthermore, to the extent there are factual questions, there is not a sufficient evidentiary basis for a decision.

CONCLUSIONS

The Commission declines to decide this issue since it involves matters such as liability and indemnity which are best resolved through arms-length negotiations by the affected parties and because the record does not provide a basis for a decision.

ISSUE NO. 3: WHEN BELLSOUTH FAILS TO SWITCH A CUSTOMER TO MCI IN A TIMELY MANNER, BELLSOUTH WILL BE DEEMED TO HAVE SLAMMED THAT CUSTOMER AND PENALTIES WILL BE ASSESSED
Contract Location: Part A, General Terms and Conditions, Section 15.2
Page 8 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

In Finding of Fact No. 31 and the Evidence and Conclusions for Finding of Fact No. 31 of the RAO, the Commission declined to prescribe general terms and conditions, specifically including liability and indemnity, leaving the parties free to negotiate contractual provisions that are not required by the Act or by the FCC's Rules. MCI argues that BellSouth's failure to switch a customer in a timely fashion is a violation of the prohibition on slamming. The difficulty arises in defining "timely." Specifying a schedule for switching customers would bring the Commission into the area of general terms and conditions which it has declined to enter.

While a provision of this nature is not inappropriate, the terms of such a provision are not issues of fact or law suitable for arbitration. Furthermore, to the extent there are factual questions, there is not a sufficient evidentiary basis for a decision.

CONCLUSIONS

The Commission declines to decide this issue since it involves matters such as liability and indemnity which are best resolved through arms-length negotiations by the affected parties and because the record does not provide a basis for a decision.

ISSUE NO. 4: "MORE FAVORED" PROVISIONS
Contract Location: Part A, General Terms and Conditions, Section 19 (Non-Discriminatory Treatment)
Page 10 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI proposes language for the "more favored" provision that is general in nature and would apply "...in the event BellSouth provides any of the services provided hereunder to any other entity..." BellSouth proposes to take the language in the "more favored" provision of the existing negotiated partial interconnection agreement, dated May 15, 1996, which already includes interconnection and interim number portability, and add a list of additional issues to be included in the "more favored" provision. The additional issues BellSouth proposes to include in the "more favored" provision are: local and toll interconnection; access to unbundled network elements, poles, ducts, conduits, rights-of-way, 911/E911 emergency network and telephone numbers; collocation; and resale.

MCI submits that its proposed nondiscriminatory treatment language implements Section 252(i) of the Act, while BellSouth's proposed language is overly restrictive and would prevent MCI from ensuring it receives nondiscriminatory treatment with respect to other carriers. BellSouth takes the position that this issue is not properly before the Commission since this issue has been approved by the Commission as part of a previous interconnection agreement.

The Commission disagrees with BellSouth that this issue has been approved by the Commission as part of a previous interconnection agreement since even BellSouth proposes to insert an additional list of issues to be covered by the "more favored" provision beyond those issues included in the existing negotiated agreement.

The Commission notes that AT&T and BellSouth have reached agreement on a "more favored" provision as contained on pages 5 and 6 of the filed Composite Agreement between those two parties dated February 21, 1997. The Commission also notes that Section 252(i) of the Act requires that:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

CONCLUSIONS

The Commission directs the parties to continue to negotiate this issue considering Section 252(i) of the Act and the agreement reached on this issue between AT&T and BellSouth.

ISSUE NO. 5: TRANSITION PERIOD FOLLOWING TERMINATION
Contract Location: Part A, General Terms and Conditions Section 20.2
Page 12 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI seeks greater flexibility regarding termination of service than BellSouth is willing to allow. Specifically, BellSouth argues that MCI should not be able to receive the benefit of a term discount, yet be able to terminate without liability. BellSouth also stated that there was no supporting testimony for this issue and therefore it is not subject to resolution and that MCI was attempting to circumvent Finding of Fact No. 2, authorizing the carrying forward of current use and user restrictions. BellSouth also noted that the language it proposes was agreed to by AT&T.

CONCLUSIONS

The Commission finds that this issue is not subject to resolution, provided that MCI may elect to accept the language proposed by BellSouth or the parties may negotiate other mutually agreeable terms.

ISSUE NO. 6: AUDITS
Contract Location: Part A, General Terms and Conditions, Section 22.1 through 22.4
Page 14 of "Joint List of Unresolved Issues"

DISCUSSION

There are several major differences between MCI and BellSouth concerning the unresolved audits issue. First, MCI's proposed language would limit the ability to audit to only MCI, while BellSouth advocates reciprocity. According to MCI, it has offered BellSouth provisions which would allow BellSouth to conduct limited audits of MCI related to evaluating usage pertaining to transport and termination of local traffic, which BellSouth declined. Second, MCI wants the ability to audit up to four times per year. BellSouth objects to four audits per year and recommends one. BellSouth is concerned that the constant presence of auditors at its facilities could be disruptive. Third, MCI proposes that BellSouth pay MCI's audit expenses if an audit results in an adjustment of charges by an annualized amount which is greater than one percent of the aggregate charges for all services purchased under the Agreement. Finally, MCI proposes that the highest interest rate allowable by law for commercial transactions should be paid by BellSouth for any overcharges to MCI.

While BellSouth furnished its substantive position, as contained above, BellSouth takes the position that this issue is not subject to resolution by the Commission in this

arbitration because it is unable to find any supporting testimony for the audit issue in the record.

The Commission notes that AT&T and BellSouth have reached agreement on each of the differences between MCI and BellSouth with respect to the audit issue. (See AT&T and BellSouth Composite Agreement, pages 10-12.)

CONCLUSIONS

The Commission directs the parties to continue to negotiate the audit issue, provided that MCI may elect to accept similar language as contained in the Audits and Inspections section of the AT&T and BellSouth Composite Agreement.

ISSUE NO 7: PRICES
Contract Location: Attachment 1, Entire Attachment
Page 17 of "Joint List of Unresolved Issues" Filed February 7, 1997

DISCUSSION

MCI and BellSouth apparently have several differences with respect to a number of provisions in each party's proposed language concerning the prices issue. MCI proposes that BellSouth should be responsible for all costs and expenses BellSouth incurs in (1) complying with and implementing its obligations under the Agreement, the Act, and the rules, regulations, and orders of the FCC and the Joint Board and (2) the development, modification, technical installation, and maintenance of any systems or other infrastructure which it requires to comply with its responsibilities and obligations under the Agreement. BellSouth contends such language is overreaching, and the Act, as well as the FCC Interconnection Order, requires a requesting carrier to bear such costs in certain situations. BellSouth recommends that this provision should be dismissed because it can find no supporting testimony in the record.

MCI also proposes that the wholesale discount rate found by the Commission for BellSouth (which was 21.5% for residential and 17.6% for business) should be adjusted for volume discounts and credits for performance standard failures. BellSouth replies that it is not obligated to provide volume discounts, nor is it willing to agree to volume discounts of the type demanded by MCI. BellSouth believes that MCI is simply attempting to have the Commission award it a benefit to which it is not entitled to receive and again recommends that the Commission dismiss this provision because it can find no supporting testimony in the record.

MCI's proposed language also states that all rates provided under the Agreement are interim and such rates include wholesale rates for resold services of BellSouth. Apparently, MCI regards the permanent wholesale discount rates established in the

Commission's RAO as interim rates, subject to true-up, although no such provision is contained in the Commission's RAO with respect to the wholesale discount rates established therein. While BellSouth did not address MCI's proposed language in this regard, BellSouth's proposed language establishes that BellSouth does not consider the wholesale discount rates established by the Commission as interim rates subject to true-up provisions.

Further, MCI's proposed price list contains only the wholesale discount rates and the prices for unbundled network elements as established by the Commission in the RAO. No rates are shown on this price list for certain interconnection support elements or for operator and directory assistance services even though the Commission directed the parties to negotiate such rates as found in the Evidence and Conclusions for Findings of Fact Nos. 23 and 28 in the Commission's RAO. It is unclear why such rates are omitted.

BellSouth's proposed language contains procedures it recommends to implement a true-up when final prices are established. MCI's proposed language does not address procedures which it recommends to implement a true-up, nor does MCI address BellSouth's proposed language in this regard. Even though the Evidence and Conclusions for Finding of Fact No. 23 in the Commission's RAO explicitly called upon the parties to meet and jointly develop the necessary mechanisms to implement the appropriate administrative arrangements needed to accomplish the true-up, it is unclear to what degree, if any, the parties negotiated and accomplished true-up mechanisms and arrangements prior to filing the Joint List of Unresolved Issues on February 7, 1997.

BellSouth's proposed price list contains proposed recurring and nonrecurring rates for several rate elements and services, some of which are in accordance with the Commission's RAO, plus proposed rates which were not established in the Commission's RAO. According to BellSouth, some of the rates displayed in its price list were based on further negotiations with MCI. Yet, in comparison, MCI's proposed price list contains only the rates established by the Commission for unbundled network elements and wholesale discount rates. Therefore, it is not clear what rate elements or services MCI is requesting for BellSouth to provide, what rates have been agreed upon in further negotiations, or exactly which rates are in dispute at this time, based upon a comparison of these price lists.

Finally, as mentioned above, BellSouth's proposed price list also contains several nonrecurring charges for unbundled network rate elements. While neither MCI nor BellSouth commented on nonrecurring charges in the "Joint List of Unresolved Issues," BellSouth's objections to the RAO, filed on January 23, 1997, pointed out that the MCI/BellSouth RAO did not contain any nonrecurring charges for unbundled network elements. In BellSouth's objections, BellSouth stated that the Hatfield Model, used by MCI, does not produce nonrecurring charges. Rather, nonrecurring charges are supposedly recovered by the recurring rates that the Hatfield Model produces. Since

BellSouth proffered the only nonrecurring rates in the record, in its objections, BellSouth requested the Commission to adopt its proposed nonrecurring rates. MCI's proposed price list contains no nonrecurring charges.

On April 1, 1997, BellSouth and MCI made a joint filing which stated that the parties were able to reach agreement as to the language concerning the prices issue; however, the parties have not been able to reach agreement on the rates. According to the agreed-upon language, the parties have now reached agreement on a true-up provision. While the wholesale discount rates established by the Commission are not subject to the true-up provision of this agreement, the Commission notes that this agreement continues to refer to prices for resold local services as interim. The Commission does not regard the wholesale discount rates established by the RAO to be interim rates.

CONCLUSIONS

The Commission directs the parties to continue to negotiate the prices issue. The wholesale discount rates established by the RAO are not interim rates and, therefore, the Commission directs the parties to remove the word "interim" with reference to prices for resold local services.

ISSUE NO. 8: REBUNDLING OF NETWORK ELEMENTS TO CREATE AN EXISTING BELLSOUTH SERVICE
Contract Location: Attachment III, Section 2.3
Page 26 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

The basic difference in the proposed contract language is that BellSouth believes that if a CLP has recombined an unbundled loop and local switching on behalf of a customer, the burden should be on the CLP to demonstrate that it has substituted a substantive functionality of its own. Until that burden is met, the CLP should be required to pay the appropriate resale rates. MCI believes that the only workable solution is for the Commission to identify which services are identical.

BellSouth's proposed language: "MCIm may use one or more Network Elements to provide any feature, function, capability, or service option that such Network Element is capable of providing or any feature, function, capability, or service option that is described in the technical references identified herein. When MCIm recombines unbundled elements to create services identical to BellSouth's retail offerings, the prices charged to MCIm for the rebundled services shall be computed at BellSouth's retail price less the wholesale discount and offered under the same terms and conditions as BellSouth offers the service to its customers. For purposes of this Agreement, MCIm will be deemed to be 'recombining unbundled elements to create services identical to BellSouth's retail

offerings' when the service offered by MCIm contain the functions, features and attributes of a retail offering that is the subject of a properly filed and approved BellSouth tariff."

MCI's proposed language: "MCIm may use one or more Network Elements to provide any feature, function, capability, or service option that such Network Elements(s) is capable or providing or any feature, function, capability or service option that is described in the technical references identified herein, provided, however, that if MCIm recombines Network Elements to create services identified by the NCUC to constitute resold services, for the purpose of pricing MCIm would pay to BellSouth an amount identical to the price MCIm would pay using the resale discount."

CONCLUSIONS

The Commission concludes that the contract language should reflect the decision reached by the Commission on this issue in the section of this Order addressing Comments/Objections.

ISSUE NO. 9: REBUNDLING OF NETWORK ELEMENTS TO CREATE AN EXISTING BELLSOUTH SERVICE
Contract Location: Attachment III, Section 2.4
Page 28 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

BellSouth's proposed language: " Subject to Section 2.3 above, BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements to permit MCIm to provide Telecommunication Services to its subscribers."

MCI's proposed language: "Subject to the provisions of Section 2.3 of this Attachment, BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers."

CONCLUSIONS

The Commission concludes that the language for this section should reflect the decision reached by the Commission on this issue in the section of this Order addressing Comments/Objections.

ISSUE NO. 10: PERFORMANCE STANDARDS
Contract Location: Attachment III, Section 13.4.2.25 (Including 13.4..2.25.1 through 13.4.2.25.4)
Page 29 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI proposes specific Line Information Database (LIDB) performance standards while those proposed by BellSouth are less specific. BellSouth also cited Finding of Fact No. 3, where the Commission declined to impose performance standards, and stated that there was no specific testimony supporting MCI's request. BellSouth recommended that the Commission dismiss this issue as beyond the scope of this proceeding. The Commission has concluded, in response to objections and comments, that its original decision in Finding of Fact No. 3, be affirmed.

CONCLUSIONS

The Commission concludes that this issue is not subject to resolution, provided that MCI may elect to accept the language proposed by BellSouth or the parties may negotiate other mutually agreeable terms.

ISSUE NO. 11: TANDEM DEEMED AN END OFFICE FOR PURPOSES OF COMPENSATING MCI
Contract Location: Attachment IV
Page 32 of "Joint List of Unresolved Issues" Filed February 7, 1997

DISCUSSION

In the Commission's RAO, both BellSouth and MCI agreed that the price for call transport and termination was not an issue in this proceeding because the parties had negotiated the price of local interconnection in the interim agreement. The Commission concurred. However, now MCI proposes that when BellSouth terminates calls to MCI's subscribers using MCI's switch, BellSouth should pay MCI dedicated transport charges plus a charge symmetrical to BellSouth's own charges for tandem switching, tandem-to-end-office transport, and end-office termination. While this issue is not clear, the MCI switch referenced in MCI's proposal is evidently only an end-office switch. However, in its comments, MCI states that according to Rule 51.711(a) of the FCC Interconnection Order, rates for transport and termination of local telecommunications traffic shall be symmetrical and reciprocal. More specifically, under FCC Rule 51.711(a)(3), where the switch of a carrier other than the incumbent LEC serves a geographic area comparable to the area served by its incumbent LEC's tandem switch, the appropriate rate for the carrier other than the incumbent LEC is the incumbent LEC's tandem interconnection rate. In summary, apparently MCI takes the position that when

BellSouth terminates calls to MCI's subscribers using MCI's end-office switch, FCC Rule 51.711 entitles MCI to be compensated by BellSouth for end-office switching, tandem switching, and transport, regardless of MCI's costs or MCI's facilities actually used to terminate local calls from BellSouth's customers.

BellSouth argues that it is unable to find any supporting testimony for this issue in the record and, thus, this issue should be dismissed as beyond the scope of this proceeding. Substantively, BellSouth also argues that MCI is simply seeking a windfall by demanding that BellSouth should pay MCI tandem switching charges in situations where there is no tandem switch. BellSouth points out that the FCC Rule which MCI relies upon to support its request is now stayed and that is completely contrary to cost-based pricing.

CONCLUSIONS

The Commission concludes that this issue is beyond the scope of this arbitration.

ISSUE NO. 12: DEFINITION OF SPARE CAPACITY
Contract Location: Attachment VI, Section 1.1.28 "Spare Capacity"
Page 35 of "Joint List of Unresolved Issues" Filed February 7, 1997

DISCUSSION

The parties differ in their definition of spare capacity. MCI proposes that there should be a common duct shared by all companies for maintenance, repair, or emergency, while BellSouth has agreed to offer one duct to any licensee who wishes to reserve spare capacity needed for reasons of safety, reliability, and generally applicable engineering purposes.

MCI contends that all companies should not have their own spare ducts because there is not enough existing capacity. BellSouth notes that in Finding of Fact No. 32, page 15 of the RAO, the Commission authorized BellSouth to reserve capacity "needed for reasons of safety, reliability, and generally applicable engineering purposes," and its position to allow other carriers to reserve spares for these same reasons is consistent with the Commission's decision. BellSouth posits that a common emergency duct as advocated by MCI raises questions and creates potential conflict and confusion among occupants of the conduit about access to the common duct and priority of service restoration, which could inappropriately hamper reliability and safety when responding to emergencies.

The Commission notes that this issue is related to Issue No. 14, which is MCI's request for common duct for emergencies as discussed subsequently herein. In stating its substantive position to Issue No. 14, BellSouth states it would have no objection to MCI reserving a duct for itself for emergency purposes and then offering to share such capacity with other telecommunications carriers willing to enter into such a sharing arrangement.

Thus, evidently MCI does not want to reserve and pay for an emergency duct for itself and does not want other carriers to be able to do so for fear of diminishing capacity MCI may wish to use in the future. MCI's proposal, if adopted, would presumably limit other carriers who may be willing to pay for an emergency duct.

CONCLUSIONS

The Commission concludes that it is appropriate to dismiss this issue as a matter beyond the scope of this proceeding.

ISSUE NO. 13: ENCUMBRANCES ON BELLSOUTH'S ABILITY TO CONVEY ITS PROPERTY RIGHTS
Contract Location: Attachment VI, Section 1.2.6 No Effect on BellSouth's Right to Convey Property
Page 37 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI accepts BellSouth's proposed language but proposes to add the following: "... and such conveyance shall be subject to MCI's rights hereunder". This language does not in itself create any rights or encumber any property. Rather it simply recognizes that rights or encumbrances may already exist and states that the agreement does not affect such rights or encumbrances.

While a provision of this nature is not inappropriate, the terms of such a provision are not issues of fact or law suitable for arbitration. Furthermore, to the extent there are factual questions, there is not a sufficient evidentiary basis for a decision.

CONCLUSIONS

The Commission declines to decide this matter since it involves matters which are best resolved through arms-length negotiations by the affected parties and because the record does not provide a basis for a decision.

ISSUE NO. 14: MCI'S REQUEST FOR COMMON DUCT FOR EMERGENCIES
Contract Location: Attachment VI, Section 1.2.9.5
Page 39 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

This issue is related to Issue No. 12 as previously discussed herein. MCI proposes language requesting a common duct for use by all carriers for emergency purposes. According to MCI, BellSouth should establish one set of emergency spares for everyone

and should not require all companies to pay for their own emergency duct. MCI fears that requiring each company to reserve their own emergency duct will quickly use up existing capacity and exhaust critical rights-of-way.

BellSouth would delete all language in this section proposed by MCI. BellSouth states it is unable to find supporting testimony in the record for this provision, and thus recommends that the Commission dismiss this issue as beyond the scope of the proceeding. Substantively, BellSouth takes the position that it will reserve space for itself and for other licensees, upon request, capacity for use in emergencies and for maintenance based upon a one-year forecast. It contends that this position is consistent with the Commission's determination that BellSouth can reserve spare capacity when needed for reasons of safety, reliability, and generally applicable engineering purposes. BellSouth acknowledges that MCI's proposed language addresses cases where an emergency affects service to more than one occupant by inclusion of a priority list, but BellSouth argues that its experience shows that most emergencies affect all occupants of a space and therefore, prioritization would still be an issue. BellSouth believes such complexity can be avoided by adopting its position on this issue. BellSouth also states it has no objection to MCI reserving a duct for itself for emergency purposes and then offering to share such capacity with other telecommunications carriers willing to enter such a sharing arrangement.

CONCLUSIONS

Consistent with the Commission's conclusions for Issue No. 12 discussed in the unresolved issues herein, the Commission dismisses this issue as beyond the scope of this arbitration.

ISSUE NO. 15: COMPLIANCE WITH BELLSOUTH'S PRACTICES RELATING TO PUMPING AND PURGING BELLSOUTH'S MANHOLES
Contract Location: Attachment VI, Section 1.3.6.7
Page 41 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

BellSouth proposes that all manhole pumping and purging should be performed in compliance with BellSouth Practice Section 620-145-011BT and any amendments, revisions, or supplements thereto and in compliance with all regulations and standards established by the Environmental Protection Agency (EPA) and any applicable state or local environmental regulators. BellSouth cites Finding of Fact No. 15 of the RAO which requires that nondiscriminatory access to its rights-of-way, poles, ducts, and conduits must be provided to MCI on terms and conditions equal to that it provides itself. BellSouth believes that the above language is consistent with the Commission's ruling. Also, since these manholes are property of BellSouth, BellSouth believes it is appropriate that all

pumping and purging by MCI should be done pursuant to BellSouth's standards and practices. (AT&T has agreed to BellSouth's proposal.) MCI agrees to comply with applicable regulatory agencies, however it does not agree to adopt the BellSouth Standard. MCI cites differences in its own procedures for accessing and working in manholes, especially with hazardous materials. In addition, MCI states that the BellSouth Standards are interpretations of EPA and Occupational Safety and Health Agency (OSHA) requirements and that some Standards are contrary to law and some are in excess of what the law requires.

CONCLUSIONS

The Commission adopts BellSouth's proposed language requiring MCI to comply with BellSouth Practice Section 620-145-011BT, "Manhole Contaminants, Water, Sediment or Debris Removal and Reporting Procedures," and any amendments, revisions, or supplements thereto in addition to compliance with all regulations and standards established by the EPA and any applicable state or local environmental regulators.

ISSUE NO. 16: MCI'S DEVELOPMENT OF PROCEDURES TO ENSURE COMPLIANCE WITH THIS SECTION
Contract Location: Attachment VI, Section 1.3.9.3
Page 43 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

BellSouth has established procedures and controls which assure that it is in compliance with regulations regarding rights-of-way. MCI has not established appropriate procedures and controls and states in its comments that it is already obligated to comply with the requirements put forth in BellSouth's proposed Section 1.3.9.3. Therefore, MCI states that it has no need for a corresponding section.

CONCLUSIONS

The Commission adopts BellSouth's proposed language requiring MCI to establish appropriate procedures and controls to assure compliance with all requirements of Section 1.3.9.3.

ISSUE NO. 17: PRACTICES RELATING TO COMPLIANCE WITH ENVIRONMENTAL LAWS
Contract Location: Attachment VI, Section 1.3.9.4
Page 45 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

BellSouth proposes that all personnel performing work on behalf of MCI should comply with BellSouth Practice Section 620-145-011BT and any amendments, revisions, or supplements thereto and in compliance with all regulations and standards established by the EPA and any applicable state or local environmental regulators. BellSouth cites Finding of Fact No. 15 of the RAO which requires that nondiscriminatory access to its rights-of-way, poles, ducts, and conduits must be provided to MCI on terms and conditions equal to that it provides itself. BellSouth believes that the above language is consistent with the Commission's ruling. MCI agrees to comply with applicable regulatory agencies, however it does not agree to adopt the BellSouth Standard. MCI cites differences in its own procedures for accessing and working in manholes, especially with hazardous materials. In addition, MCI states that the BellSouth Standards are interpretations of EPA and OSHA requirements and that some Standards are contrary to law and some are in excess of what the law requires.

CONCLUSIONS

The Commission adopts BellSouth's proposed language requiring MCI to comply with BellSouth Practice Section 620-145-011BT, "Manhole Contaminants, Water, Sediment or Debris Removal and Reporting Procedures," and any amendments, revisions, or supplements thereto in addition to compliance with all regulations and standards established by the EPA and any applicable state or local environmental regulators.

ISSUE NO. 18: BELLSOUTH'S PROVISION OF INFORMATION RELATING TO AVAILABILITY OF SPACE
Contract Location: Attachment VI, Section 1.5.2.2
Page 47 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI proposes that BellSouth provide pole, conduit, and rights-of-way availability information in response to a written request within three business days. MCI states that there must be some maximum time limit on producing information which is readily available. BellSouth recommends that the Commission dismiss this issue as beyond the scope of this proceeding but also states that MCI's demand is not reasonable. The ability of BellSouth to process requests within three business days is dependent on many factors: the number of pending requests from other carriers, the magnitude of the request from MCI, the complexity of the requests, etc. BellSouth further states that AT&T has agreed that such operational issues can be dealt with outside of the agreement through a task force that shall determine the appropriate time frames.

The RAO does not set forth specific time frames for processing information requests but directs BellSouth and MCI to formulate guidelines to be followed in handling requests.

CONCLUSIONS

The Commission concludes that this issue is not subject to resolution but encourages the formation of a task force by BellSouth and MCI to determine mutually acceptable time frames.

ISSUE NO. 19: BELLSOUTH'S PROVISION OF INFORMATION RELATING TO AVAILABILITY OF SPACE
Contract Location: Attachment VI, Section 1.6.3
Page 49 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI proposes that within ten business days after it has submitted its written application for a license, BellSouth shall advise MCI whether an environmental, health, and safety inspection has been performed and shall supply MCI with any inspection report. MCI contends that environmental information is critical to making a decision to occupy conduits or poles. BellSouth proposes to delete this section and recommends that the Commission dismiss this issue as beyond the scope of this proceeding. BellSouth, however, has investigated MCI's request and found that it is highly unlikely BellSouth would have actual knowledge of any inspection or assessment and that it would have to check in many different departments and locations to determine if an inspection or assessment had been performed.

CONCLUSIONS

The Commission concludes that this issue is not subject to resolution.

ISSUE NO. 20: BELLSOUTH'S PROVISION OF CUSTOMER CREDIT HISTORY THROUGH ELECTRONIC INTERFACES
Contract Location: Attachment VIII–8, Section 2.1.5.3
Page 51 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI proposes the inclusion of contract language that requires BellSouth to provide MCI with a real-time electronic interface to some customer proprietary network information (CPNI) to obtain customer payment history information that it considers as essential to the sales process. Further, MCI proposes that the contract also state that the parties shall mutually agree upon restrictions that will appropriately safeguard subscribers' privacy.

However, MCI argues that a signed letter of authorization (LOA) cannot be administered as part of this process.

BellSouth opposes the inclusion of this proposal in the contract. BellSouth argues that the FCC has determined that credit information is not CPNI, therefore, MCI's position is inappropriate. Further, BellSouth states that there was no specific testimony supporting MCI's request, and thus, pursuant to the Commission's Order of October 31, 1996, the Commission should dismiss this issue as beyond the scope of this proceeding.

The Composite Agreement does include mutually agreed upon terms that allows for the release of a customer's payment history to MCI if the subscriber authorizes the release of such information. Specifically, in the Composite Agreement, the parties have agreed to include contract language which provides the following:

Subscriber Payment History (Attachment VIII, Sections 2.1.5 through 2.1.5.1.8)

> To the extent each party has such information, MCI and BellSouth agree to make available to each other such of the following subscriber information as the subscriber authorizes BellSouth or MCI to release: applicant's name, address; previous phone number, if any; amount, if any, of unpaid balance in applicant's name; whether applicant is delinquent on payments; length of service with prior local or intraLATA toll provider; whether applicant had local or intraLATA toll service terminated or suspended within the last six months with an explanation of the reason therefor; and whether applicant was required by prior local or intraLATA toll provider to pay a deposit or make an advance payment, including the amount of each.

In the arbitration proceeding, the parties requested that the Commission resolve the parties' disagreement over the provision of real-time and interactive access via electronic interfaces for the operations support system functions consisting of pre-ordering, ordering, provisioning, maintenance/repair, and billing functions and that was addressed in the RAO. However, as to this unresolved issue of an electronic interface to access BellSouth's customer proprietary network information to obtain customer payment history information, the Commission is unable to find testimony in this regard, or any discussion in the parties' respective Proposed Orders or Briefs, and thus, concludes that this matter was not appropriately presented for arbitration.

CONCLUSIONS

The Commission concludes that it is appropriate to dismiss this issue as a matter beyond the scope of this proceeding and, thus, finds this issue not subject to resolution.

ISSUE NO. 21: BELLSOUTH'S PROVISION OF CUSTOMER CREDIT HISTORY WITH BLANKET LETTER OF AUTHORIZATION.
Contract Location: Attachment VIII, Section 2.1.5.4
Page 5 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI seeks use of a blanket letter of authorization (LOA) to have access to a customer credit history. BellSouth argues that blanket LOAs do not adequately protect customer privacy and maintains that there is no supporting testimony in the record for this issue.

The Commission views customer credit history as sensitive information that should not be required to be accessible through electronic interface. Since this is the case, the argument for access to such information by means of a blanket LOA is less than compelling. The Commission further notes that credit history can be obtained through a variety of sources, as, for example, from the prospective customers themselves or credit reporting agencies.

CONCLUSIONS

The Commission concludes that this issue is not subject to resolution.

ISSUE NO. 22: CUSTOMER SERVICE RECORDS
Contract Location: Attachment VIII. Section 2.32.3.1.2
Page 53 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI seeks use of a blanket letter of authorization (LOA) to have access to customer service records. BellSouth argues that blanket LOAs do not adequately protect customer privacy and maintains that there is no supporting testimony in the record for this issue.

While the Commission notes that this was not originally an issue in this docket, the Commission has dealt with a similar arbitration issue in Docket No. P-140, Sub 51, [GTE South Incorporated (GTE)/AT&T] and Docket No. P-141, Sub 30 [GTE/MCI] as Issue No. 3(c). In those dockets, the Commission reached a policy conclusion favoring the use of blanket LOAs with respect to "relevant account information," defined in that context as a "customer list of scheduled services on or about the time of transfer." Customer privacy is protected by requiring that the CLP must obtain and, in the event of a dispute, be prepared to produce the written or third-party verified authorization of the customer in a manner consistent with FCC Rules.

The Commission views access to customer service records through a blanket LOA to be reasonable subject to safeguards, such as a requirement that the CLP must obtain and, in the event of a dispute, be prepared to produce a written or third-party verified authorization of the customer access to such information.

CONCLUSIONS

The Commission concludes that the parties be instructed to negotiate mutually agreeable terms consistent with the Commission's decision in the GTE dockets.

ISSUE NO. 23: DATE FOR ON-LINE ACCESS TO TELEPHONE NUMBERS
Contract Location: Attachment VIII–19, Section 2.3.2.6
Page 54 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

MCI proposes the inclusion of contract language that requires BellSouth to provide on-line access to telephone number reservations by January 1, 1997, whereas BellSouth proposes a date of April 1, 1997.

BellSouth states that its proposal is consistent with the determination of the Commission regarding the development of electronic interfaces. In the RAO, in Finding of Fact No. 4, the Commission encouraged BellSouth to diligently pursue the development of electronic interfaces, such that they will be provided promptly. It is BellSouth's opinion that the date of April 1, 1997, reflects its intent to provide on-line access as expeditiously as practicable.

CONCLUSIONS

The Commission recognizes that BellSouth's proposal represents its intent to provide on-line, electronic access as expeditiously as practicable, which is consistent with the Commission's finding in the MCI/BellSouth--RAO, regarding the development and implementation of electronic interfaces. Accordingly, the Commission considers that BellSouth's proposal is reasonable in this regard.

ISSUE NO. 24: PERFORMANCE MEASUREMENTS
Contract Location: Attachment VIII, Section 2.5
Page 55 of "Joint List of Unresolved Issues" filed February 7, 1997

DISCUSSION

This is a variation of the unresolved issue previously discussed in Issue No. 10, but with reference to various service measurements.